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22

MONITORING THE IMPLEMENTATION OF THE PUBLIC PROCUREMENT QUARTERLY REPORT

ON MONITORING
THE IMPLEMENTATION
OF PUBLIC PROCUREMENTS IN
THE REPUBLIC
OF MACEDONIA

22 MONITORING THE IMPLEMENTATION OF PUBLIC PROCUREMENTS IN THE REPUBLIC OF MACEDONIA

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Abbreviations

BPP	Bureau of Public Procurements
SAO	State Audit Office
SCPPA	State Commission on Public Procurement Appeals
CA	Contracting Authorities
EO	Economic Operators
EPPS	Electronic Public Procurement System
EU	European Union
LPP	Law on Public Procurement
RM	Republic of Macedonia
CCC	Center for Civil Communications

KEY FINDINGS AND RECOMMENDATIONS

- **Significant share of bids submitted in tender procedures do not reach the bid-evaluation stage. In that, reasons indicated for rejection of bids include administrative shortcomings of bids submitted and failure to fulfil requirements defined in relevant tender documents (eligibility criteria and terms and conditions defined in tender specifications).**

Recommendation: Detailed technical specifications should not be used for the purpose of limiting competition in public procurements. Technical specifications should define quality of goods and services being procured, but they should not be intended to limit and/or restrict competition. At the same time, Article 140, paragraph 3 of the Law on Public Procurements needs to be further specified with a view to avoid risk of subjective interpretation of contracting authorities' right to request bidding companies to complete and supplement their bid-related documents submitted. Current wording of this legal provision enables discretionary interpretations and actions on the part of institutions, depending on whether they want the company's bid to be included or exempted from the bid-evaluation process.

- **In the period until new amendments to the Law on Public Procurements enter in effect, contracting authorities continued to define unattainable criteria for assessing bidding companies' eligibility for tender participation. Competition is still on unsatisfactory level. Only 47% of tender procedures from the monitoring sample were completed with e-auction.**

Recommendation: Insufficient competition in tender procedures is still a major feature of the public procurements

system. For the purpose of addressing this problem, in addition to law amendments, series of other measures need to be taken with a view to increase business sector's trust and to stimulate greater competition in public procurements.

- **Recently adopted law amendments did not yield expected results in terms of reduced number of tender annulments. In the second quarter of 2014, 22.4% of all announced tender procedures were annulled. On semi-annual level (January-June 2014), share of annulled tender procedures accounts for 22.8% of all tenders announced and is marked by moderate increase compared to the same period last year.**

Recommendation: Frequent annulment of large-scale tender procedures with high value impose the need for competent institutions and contracting authorities to regularly monitor this problem with a view to obtain detail insight about state-of-affairs and to take measures on sanctioning possible violations.

- **Due to new legal provisions in effect, the share of contracts signed by means of negotiation procedures without previously announced call for bids was reduced in the second quarter of 2014. In the monitoring period, the total value of contracts signed in this manner accounts for 10.5 million EUR.**

Recommendation: On-going tendency on reduced use of negotiation procedures without previously announced call for bids is positive and welcomed, but monitoring efforts should continue with a view to assess long-term effects of new legal amendments adopted in this regard.

- **No progress is noted in terms of contracting authorities' awareness about the manner in which bank guarantees should be used, i.e. to reduce tender participation costs for bidding companies, but increase companies' responsibility for quality performance of procurement contracts signed.**

Recommendation: In order to reduce institutions' subjective approach towards use of bank guarantees for quality performance of contracts, the business sector should be consulted about the possible introduction of legal provision on mandatory bank guarantees for quality performance of contracts in cases of public procurements with high value.

- **In the second quarter of 2014, total of 10 negative references were issued, whereby 9 companies were put on the so-called black list for the first time. In that, the total number of companies prohibited to participate in tender procedures from the entry in effect of this legal provision until June 2014 reached 54.**

Recommendation: Greater transparency is needed in terms of issuing negative references to bidding companies, which means that decisions on negative references must also indicate the contracting authority issuing the negative reference and the relevant number of tender procedure under which this reference was issued. At the same time, it should be examined whether it is justified for all contracting authorities to issue this type of sanctions and whether the prohibition should concern all tender procedures, including an analysis of violations on the basis of which negative references are issued.

- **Multiannual trend of decreasing number of appeals lodged by companies in front of the State Commission on Public Procurement Appeals (SCPPA) is discontinued. In the first semester of 2014, SCPPA was presented with a total of 330 appeals, accounting for an increase by 13.4% compared to the same period last year. Also, for the first time in several years, high share of decisions taken by SCPPA imply approval of appeals.**

Recommendation: Analysis of specific decisions taken by SCPPA does not only provide details about the position assumed by this second instance body, but also insight in certain more specific interpretations of provisions contained in LPP.

GOALS AND METHODOLOGY

From November 2008, the Centre for Civil Communications from Skopje has continuously analysed the implementation of public procurements in the Republic of Macedonia as regulated under the Law on Public Procurements. The analysis aims to assess the implementation of public procurements in the light of the new Law on Public Procurements and the application of the underlying principles of transparency, competitiveness, equal treatment of economic operators, non-discrimination, legal proceeding, cost-effectiveness, efficiency, effectiveness and cost-effective public spending, commitment to obtain the best bid under the most favourable terms and conditions, as well as accountability for public spending in procurements.

Analysis of the public procurement process in the Republic of Macedonia is performed on the basis of monitoring a randomly selected sample of public procurement procedures (40 per quarter). Monitoring activities start with the publication of calls for bids in the "Official Gazette of the Republic of Macedonia" and in the Electronic Public Procurement System (EPPS), followed by attendance at public opening of bids and data collection on the procedure course, and use in-depth interviews and structured questionnaires submitted to economic operators, as well as data collected from contracting authorities through EPPS and by means of Freedom of Information (FOI) applications.

The present analysis was performed on the basis of monitoring a selected sample comprised of 40 public procurement procedures implemented by central level contracting authorities, whose public opening of bids took place in the period April-June 2014. In addition, the report includes an analysis of appeal procedures led in front of the State Commission on Public Procurement Appeals in the period January–June 2014.

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- **Significant share of bids submitted in tender procedures do not reach the bid-evaluation stage. In that, reasons indicated for rejection of bids include administrative shortcomings of bids submitted and failure to fulfil requirements defined in relevant tender documents (eligibility criteria and terms and conditions defined in tender specifications).**

Exemption of bidding companies from bid-evaluation process was recorded in around 25% of public procurements monitored in the period April-June 2014. In that, it cannot be assessed that shortcomings identified are necessarily a result of bidding companies' fault. Evidence in support of this statement is identified in tender procedures from the monitoring sample analysed below.

Two from total of three bids have been exempted from bid-evaluation in the procurement procedure organized for transporting/forwarding and insurance services concerning handwritten manuscripts from Macedonia. In that, one of the companies whose bid was assessed as unacceptable, has offered an unusually low price under the justification that it did not calculate insurance costs that should have been included as they were indicated in relevant tender documents and were part and parcel of the said procurement. Second company exempted from the bid-evaluation process did not fulfil the requirement on having performed at least one contract related to procurement's subject. Namely, this bidder provided evidence on performance of contract concerning transportation of museum objects, which the contracting authority assessed as unacceptable on the grounds that library materials are not the same as museum items! Hence, from total of three bids submitted in this tender procedure, only one bid was assessed as acceptable. When submitting the final price, the single com-

pany remaining in the procedure reduced the initial price by 0.8% and was awarded the procurement contract.

Furthermore, one procurement procedure from the monitoring sample concerning office and computer supplies received a total of five bids. Two companies were exempted from the bid-evaluation process on the grounds that they did not fulfil requirements defined in technical specifications, according to which copy paper's non-translucency (A3 and A4) should be at least 92%. Both companies whose bids were rejected offered paper with 91% non-translucency. In this context, another tender procedure from the monitoring sample which concerned procurement of disposable medical supplies (examination gloves), received a total of six bids, but exempted four of them on the grounds that samples have not been provided in their original packaging, as required in technical specifications for the procurement in question.

Exemption of bids from the bid-evaluation process due to non-compliance with technical specifications was also recorded in the tender procedure on procurement of hospital bed linens. From initial four bids, two were exempted on the grounds that the samples provided do not fulfil the extremely detailed technical specifications.

Relevant situations observed in the three cases described above raise the question whether technical specifications should be defined in a manner that limits competition. Namely, technical specifications should define quality of goods and services being procured, but they should in no case limit or restrict competition.

One bidding company was also exempted in the tender procedure on procurement of maintenance services for scales. One of two bidders in total was exempted from bid-evaluation on the grounds that the statement of serious intent had not been signed by an authorized person at the company in question. In that, the second bidder, being the only one that qualified, was called to submit a new, lower price. Once this company refused to decrease its initial price, the contracting authority annulled the tender procedure on the grounds that the price obtained is less favourable than actual market prices.

Under the tender procedure concerning procurement of soft drinks, two of four bids in total were rejected as unacceptable, while the remaining two bidding companies were required to complete and supplement their bid-related documents within a given deadline. In that, the justification offered for rejection of two bids included the fact that the

bidding companies have not filled-in their bid-related documents in terms of total bid price, with and without VAT. It should be noted that total prices for all bids received were read at the public opening of bids attended by CCC's monitor. Therefore, unclear is why these prices have not been included in the bids. As regards the remaining two bids, it has been established that they are missing some of mandatory documents required in the relevant tender documents, which should have resulted in rejection of these bids as well. Be that as it may, the public procurement committee at the contracting authority did not exempt these bidding companies, but requested them to provide the missing documents within a given deadline. In that, one of the companies was requested to complete its documents by submitting a list of previously performed contracts, and the second company was instructed to complete the bid with all documents relevant for establishing its eligibility for tender participation, i.e. document on registered activity (DRD template), list of previously performed contracts and to accept the arithmetical error identified by the committee. Ultimately, the bid that initially did not include a range of mandatory documents was selected as the most favourable one. Actions of this contracting authority in the above-analysed procedure are consequence of discretionary rights given to contracting authorities about situations in which they can request bidding companies to complete and supplement their bid-related documents and in which they can reject the bids on the grounds of being incomplete. Moreover, the State Commission on Public Procurement Appeals (SCPPA) has confirmed this discretionary right in a series of decisions taken where it has assumed the position that requests for completion of bid-related documents is a right, but not an obligation of contracting authorities. SCPPA has assessed that when verifying completeness and validity of documents used to establish bidding companies' eligibility and when evaluating their bids, public procurement committees can request companies to clarify or submit additional documents, unless it is a matter of significant deviations from requested documents. In that, it has been stressed that contracting authorities are not allowed to create advantages for a particular economic operator, by requesting additional clarifications or supplements from others. This has triggered the dilemma about the manner in which it is established whether a particular bidder has been given advantage in the public procurement, knowing that SCPPA acknowledges the discretionary right of contract-

ing authorities, i.e. their public procurement committees to decide whether to request bidding companies to clarify or submit additional documents or not.

Recommendation: Detailed technical specifications should not be used for the purpose of limiting competition in public procurements. Technical specifications should define quality of goods and services being procured, but they should not be intended to limit and/or restrict competition. At the same time, Article 140, paragraph 3 of the Law on Public Procurements needs to be further specified with a view to avoid risks of subjective interpretation of contracting authorities' right to request bidding companies to complete and supplement their bid-related documents submitted. Current wording of this legal provision enables discretionary interpretation and actions on the part of institutions, depending on whether they want the company's bid to be included or exempted from the bid-evaluation process.

- **Having in mind that amendments to the Law on Public Procurements aimed at increasing competition in tender procedures entered in effect on 1 May 2014, i.e. simultaneously with the establishment of the Council of Public Procurements within the Bureau of Public Procurements (BPP), it is still early to assess their effects. However, monitoring findings provide the conclusion that majority of contracting authorities, in expectation of these amendments to enter in effect, continued with their old practices.**

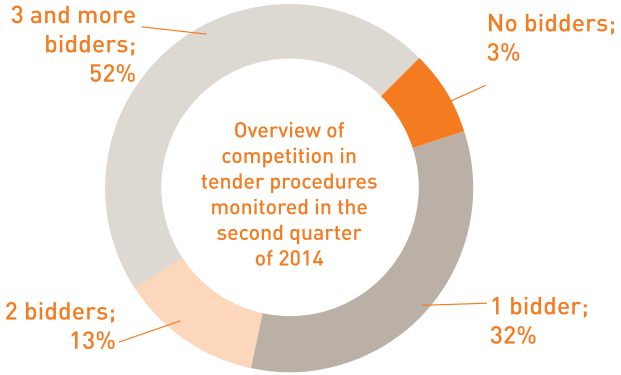
According to last amendments to LPP ("Official Gazette of the Republic of Macedonia" no. 148/2013), in effect from 1 May 2014, contracting authorities are obliged, prior to announcement of procurement notices, to obtain approval from the Council of Public Procurements in cases when there are less than five manufacturers/economic operators fulfilling requirements defined in relevant technical specifications. At the same time, approval from the Council of Public Procurements is mandatory in cases when relevant tender documents include eligibility requirements that cannot be fulfilled by:

- three or less than three economic operators, in cases of bid-collection procedures whose value does not exceed 5,000 EUR;

- four or less than four economic operators, in cases of bid-collection procedures whose value exceeds 5,000 EUR; or
- five or less than five economic operators, in cases of open procedures, limited procurement procedures, negotiation procedures without previously announced call for bids and procurement procedures with competitive dialogue.

Having in mind that this report is developed on the basis of monitoring sample comprised of tender procedures implemented in the period April-June 2014, it would be rushed to infer conclusions about the effects of new legal provisions.

However, it can be stated that competition under public procurements in the second quarter of 2014 is not on the desired level. Satisfactory competition, with at least three bidding companies, was recorded in 52% of public procurements monitored. Nevertheless, share of tender procedures with only one bid is still exceptionally high (32%).



Of course, reasons for high share of tender procedures with low number of bidders should be identified in disproportional and unattainable eligibility criteria for tender participation. Evidence in support of this statement are the tender procedures analysed below, as they provide rather dramatic examples of such practices.

A contracting authority (student dormitory) organizing a tender procedure on procurement of insurance services (building, equipment, money and student vouchers, vehicles and insurance of employees from accidents) in estimated value of 1,032,546 MKD without VAT (around 17,000 EUR), defined the following eligibility criteria for tender participation:

- annual gross premium written in the amount of more than 700,000,000 MKD for each of the last 3 years;
- annual gross indemnity claims paid (liquidated) in the amount of more than 500,000,000 MKD for each of the last 3 years;
- the insurance company to be reinsured with a world renowned reinsurance company (with mandatory property reinsurance for 2014);
- at least 10 employees with relevant qualifications, i.e. bachelor degrees in mechanical, electrical and civil construction engineering; and
- at least 100 full-time employees.

Only one insurance company submitted a bid in this tender procedure and was selected as the most favourable bid. Defined eligibility criteria (primarily the requirements concerning the number and qualification of employees) are absolutely disproportionate to the procurement's scope and were, obviously, intended to reduce competition in the tender procedure.

One public enterprise that organized a procurement procedure for reconstruction of elevators, with estimated value of 3,500,000 MKD without VAT (57,000 EUR), imposed the following eligibility criteria for tender participation:

- total annual turnover in the amount of 500,000 EUR for each of the last 3 years;
- at least two employees with relevant higher education degree (mechanical or electrical engineering);
- reference list of previously performed contracts in the last three years and at least five references on successful performance of contract services from the list; and
- ISO 9001:2008 certificate on quality management system.

Disproportionality of eligibility criteria is primarily identified in the requirement on annual turnover (500,000 EUR) which is 8.8 times higher than the contract's value. Good practices imply a maximum ratio of 1:3. Only one bidding

company participated in this tender procedure and was awarded the contract, without being asked to reduce its initial price. Actually, the public enterprise awarded this procurement contract to the same company with which it has signed elevator maintenance contracts in 2011, 2012 and 2013.

Furthermore, bidding companies in the tender procedure from the monitoring sample concerning consultant services for preparation of conference tourism strategy with action plan for the period 2014-2016, in estimated value of 360,000 MKD without VAT (around 5,900 EUR), were required to demonstrate their technical or professional ability by fulfilling following terms and conditions:

- to have prepared at least one strategy in the relevant field;
- to have employed or contracted persons responsible for performance of contract tasks, for which the economic operator should guarantee that they would not be engaged by another economic operator for performance of said contract tasks, i.e. they would not be included as experts under another bid submitted in the same tender procedure. List of experts should be profiled in the following areas, i.e. they should perform following tasks:
  - project coordinator (key expert no. 1);
  - senior researcher – expert in tourism (key expert no. 2);
  - expert in tourism (key expert no. 3); and
  - assistant researcher (key expert no. 4);
- one person can be proposed to perform only one job position, otherwise the bid will be rejected as unacceptable;
- project coordinator (key expert no. 1) should hold PhD degree in the field of tourism and should have published academic and professional papers in domestic or international scientific journals;
- senior researcher – expert in tourism (key expert no. 2) and expert in tourism (key expert no. 3) should hold at least master degrees in tourism with total of 300 credits according to ECTS; and
- junior researcher (key expert no. 4) should hold at least bachelor degree, i.e. to have completed VII/1 education level or have acquired 180 or 240 credits according to ECTS.

Given the high eligibility criteria defined and procurement's low value, this tender procedure did not receive any bids. According to the Law on Public Procurements, when the contracting authority has not received any bids on the previously announced tender procedure, it is entitled to follow up with non-transparent negotiation procedure without previously announced call for bids.

Furthermore, under the tender procedure on procurement of airline tickets in estimated value of 500,000 MKD without VAT (slightly more than 8,000 EUR), bidding companies were required to:

- submit evidence on total annual turnover in the amount of at least 5,000,000 MKD for the last 3 years (2011, 2012 and 2013); and
- submit a certificate issued by the Global Distribution Systems Amadeus or Galileo for having sold 1,500 air flight tickets in the course of 2013.

These eligibility criteria are disproportionate because bidding companies were requested to demonstrate annual turnover in an amount that is 10 times higher than the contract's value. Only one bidding company participated in this tender procedure and was awarded the contract, without being asked to reduce its initial price.

One bid was received also in the tender procedure implemented by a state institute procuring services for ongoing and investment maintenance of buildings, in an estimated value of 15 million MKD without VAT (244,000 EUR). Eligibility criteria used to determine bidding companies' ability included:

- positive final balance sheets and profit and loss statements for the previous year, verified by the competent authority;
- annual turnover in the amount of at least 40,000,000 MKD for the last year from performance of activities related to the procurement's subject;
- technical staff with at least 20 employees and established technical bodies;
- 3 (three) civil engineers holding A type certificates;
- 1 (one) architect;
- at least 1 (one) light commercial vehicle;

- at least 3 (three) freight vehicles;
- at least 1 (one) excavator with capacity of at least 2.5 tonnes;
- at least 2 (two) large rotary hammers;
- at least 5 (five) small rotary hammers;
- at least 3 (three) grinders;
- aluminium mobile platform, at least 6 m high;
- insurance policy (insurance on professional liability during performance of construction works); and
- certificate issued by the Public Revenue Office on paid last month's salaries and salary contributions for employees.

Concerns are raised with the fact that above-enlisted eligibility criteria implied profitable operation, high number of employees and certificate on paid salaries and salary contributions for the last month. Given that only one bidding company participated in this tender procedure, it was asked to reduce its initial price, which was ultimately done and the company reduced its price by around 3%.

Tender procedure on procurement of services for printing of advertising materials, in estimated value of 600,000 MKD without VAT (around 10,000 EUR), requested bidding companies to fulfil following eligibility criteria:

- at least 15 full-time employees, with enclosed copies of M1/M2 templates as proof of official employment; and
- at least 5 references on quality and timely contract performance.

Although two bids were submitted and e-auction was scheduled, number of bidding companies, i.e. competition level in this tender procedure is lower than the common level of competition for this type of procurements, having in mind the high number of printing houses operating in the country.

Two bidding companies also participated in the tender procedure on procurement of services related to printing of templates and other printing services, in estimated value of 2 million MKD. In that, one of them failed to demonstrate fulfilment of following eligibility criteria:

- not to have operated with financial loss in the last three years;
- at least 10 full-time employees;

- evidence for previous contracts performed for same procurement subject in the last 3 years;
- references issued by relevant contracting authorities on adequate, timely and quality contract performance in the last year;
- evidence on technical equipment and economic operator's ability, as well as quality assurance measures.

After one of the bidding companies was excluded, this tender procedure was concluded by signing the procurement contract with the only acceptable bid, without reduction of its initial price.

Having in mind that possibility for organization of e-auctions depends on the competition level, e-auctions were organized in 47% of tender procedures from the monitoring sample. In that, evident is that the final prices offered in the course of downward bidding were reduced by 0.2% to 52.7% compared to initial prices. Half of tender procedures with participation of only one bidding company were finalized with minimal reduction of prices, whereas the other half of tender procedures were finalized under the initial prices bided. In the case of one bidding company participating in the tender procedure, price reductions made upon invitations to submit final price range from 0.1% to 3.0% of initial prices offered at the public opening of bids.

Recommendation: Insufficient competition in tender procedures is still a major feature of the public procurements system. Therefore, vigilant monitoring efforts should continue with a view to assess effects of recently adopted amendments to LPP.

- **New legal solutions, in effect from 1 January 2014, did not yield expected results in terms of reduced number of tender annulments. In the second quarter of 2014, 22.4% of all announced tender procedures were annulled. On semi-annual level (January-June 2014), share of annulled tender procedures accounts for 22.8% of all tender announced and is marked by moderate increase compared to the same period last year.**

Some of more significant amendments recently made to the Law on Public Procurements ("Official Gazette of the Republic of Macedonia" no. 148/2013) were aimed at reducing the number of annulled tender procedures and reduced use of negotiation procedure without previously announced call for bids. New legal solutions, in effect from 1 January 2014, allow contracting authorities to reduce tender annulments in cases when the only bidder has offered prices higher than the procurement's estimated value by inviting them to offer new, so-called final offer/price, which is lower than the initial price. In the past, such tender procedures were annulled and contracting authorities proceeded with negotiation procedure without previously announced call for bids, which might, but did not necessarily imply lower prices. Summary analysis of all data submitted in EPPS provides the conclusion that the share of annulled tender procedures is still high. As shown in the table below, the share of annulled from total tender procedures announced in the second quarter of 2014 accounts for 22.4%, which is an increase by 4.2 percentile points compared to the same period last year.

Trend of tender annulments per quarters

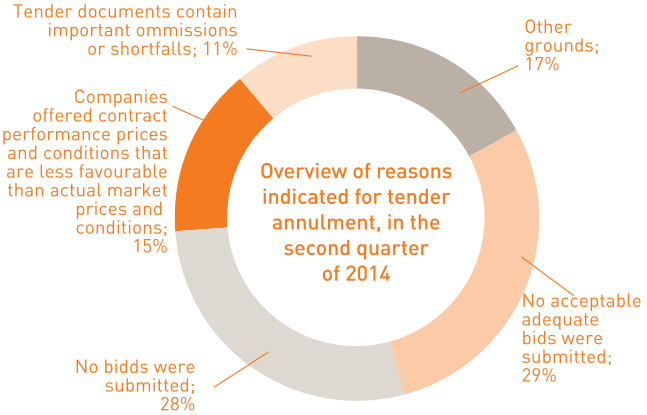
Period	Number of calls announced	Number of tender annulment decisions	Share of annulled procedures
April-June 2012	2,225	552	24.8%
April-June 2013	5,385	979	18.2%
April-June 2014	**3,950**	**883**	**22.4%**

Calculations include data available by 23.7.2014

At the same time, analysis of EPPS data for the period April-June 2014 shows that annulments are more frequent in cases of large-scale tender procedures. More specifically, 17.6% of all announced tender procedures in value of 500 EUR to 20,000 EUR for procurement of goods and services, i.e. 50,000 EUR for construction works, were annulled, i.e. 578 from the total of 3,219 procurement notices have been annulled. As regards open procedures, i.e. procedures whose

value exceeds 20,000 EUR for goods and services, i.e. 50,000 EUR for construction works, the share of annulled tender procedures accounts for 39.6%. In other words, 248 from the total of 718 procurement notices have been annulled.

Analysis of reasons indicated for tender annulment inevitably lead to the already established fact that tender annulments are a result of insufficient competition in public procurements. Namely, 29% of tender procedures were unsuccessful (i.e. annulled) due to the fact that not a single bid was considered acceptable or adequate. As high as 28% of tender procedures were annulled on the grounds of not having received any bids, while the reason for annulment of 15% of tender procedures implied that companies have offered prices that are assessed as less favourable than actual market prices. 11% of tender procedures were annulled on the grounds of important shortfalls in relevant tender documents.



On semi-annual level, the share of tender annulments accounts for 22.8%.

Trend on tender annulments on semi-annual level

Period	Number of tenders announced	Number of decisions on tender annulment	Share of annulled procedures
January-June 2012	4,176	1,015	24.3%
January-June 2013	9,046	1,951	21.6%
January-June 2014	**8,637**	**1,967**	**22.8%**

As indicated in the table above, number of tender annulments in the period January-June 2014 is by 0.8% higher compared to the first semester last year, but it is still by 1.5 percentile point lower than the record high level of tender annulments observed in 2012.

Recommendation: Frequent annulments of large-scale tender procedures with high value impose the need for competent institutions and contracting authorities to regularly monitor this problem with a view to obtain detailed insight about state-of-affairs and to take measures on sanctioning possible violations.

- **Due to new legal provisions in effect, the share of contracts signed by means of negotiation procedures without previously announced call for bids was reduced in the second quarter of 2014. In the monitoring period, the total value of contracts signed in this manner accounts for 10.5 million EUR.**

In the period April-June 2014, a total of 205 contracts were signed by means of negotiation procedure without previously announced call for bids, in total amount of 646,215,789 MKD (10,507,573 EUR). They imply a significant reduction by 45.6% compared to the previous quarter, i.e. by 8.7% compared to the same period last year, as shown in the table below. Reduced number and value of contracts signed in this manner are a result of the possibility introduced in LPP on applying the concept of so-called final price/bid, i.e. in cases when only one bid is received, instead of engaging in negotiations with the single bidding company, the same is invited to offer new, reduced price that is in the range of the procurement's estimated value.

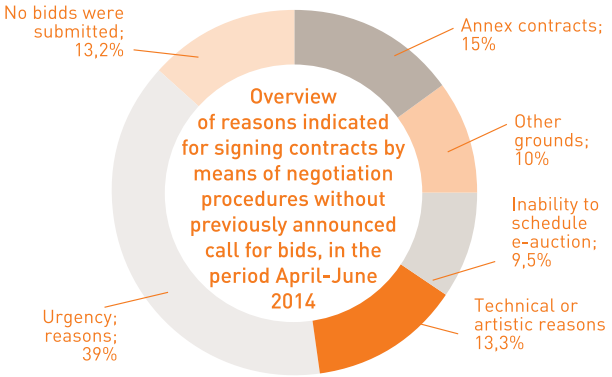
Overview of procurement contracts signed by means of negotiation procedures without previously announced call for bids

Period	Value of contracts (in million EUR)	Difference
April-June 2012	5.8	-52.8%
April-June 2013	11.5	+98.3%
April-June 2014	**10.5**	**-8.7%**

Calculations include data available by 31.7.2014

Nevertheless, in this monitoring period three cases were noted in which contracting authorities acted according to old legal provisions, i.e. they engaged in negotiations with the only bidding company. In that, when signing these contracts in total value of 1 million EUR, institutions referred to respective tender procedures implemented for the procurements in question by the end of last year.

As shown in the diagram below, in the period April-June 2014, the dominant reason for use of this non-transparent procedure is urgency, i.e. situation in which institutions need a particular product or service, but do not have time to implement tender procedures. This ground was indicated as reason for signing 82 contracts in total value of 4.1 million EUR. For comparison purposes, in the first quarter of 2014, urgency was indicated as the reason for signing 59 contracts in total value of 2.2 million EUR.



In this monitoring period, a total of 21 annex contracts in total value of more than 1.5 million EUR were signed, while protection of exclusive rights, i.e. copyrights of particular companies were indicated as reason for signing 60 contracts in total value of around 1.4 million EUR.

Recommendation: On-going tendency on reduced use of the negotiation procedure without previously announced calls for bids is positive and welcomed, but monitoring effects should continue with a view to assess long-term effects of new legal amendments adopted in this regard.

- **No progress is noted in terms of contracting authorities' awareness about the manner in which bank guarantees should be used, i.e. to reduce tender participation costs for bidding companies, but increase companies' responsibility for quality performance of procurement contracts.**

Bank guarantees were requested in every fourth tender procedure from the monitoring sample, while bank guarantees for quality performance were requested in every third tender procedure. Absurd situations were noted in which institutions have requested bank guarantees for the bid submitted, but did not request bank guarantees for quality contract performance.

Despite the law-stipulated possibility to request bidding companies to provide statement of serious intent as form of guarantee that they would not withdraw their bids, relevant contracting authorities continued to request bank guarantees for bid, as noted in 25% of tender procedures monitored. Such practices are indicative of the fact that contracting authorities are not guided by ideas on stimulating competition among companies but are, purposefully or by default, using old mechanisms that impose additional costs for bidding companies.

There is no progress in terms of desired use of bank guarantee for quality contract performance. On the contrary, monitoring findings show decreased use of this type of guarantees compared to the previous quarter. Such practices on the part of contracting authorities can create risk, having in mind that all tender procedures with at least two bidding companies should be finalized with organization of e-auctions which, in some cases, might result in significantly reduced prices. In cases when "lowest price" is the main selection criterion and tender procedures are completed with e-auctions,

there is risk of jeopardized quality of contract performance due to unrealistic low prices. Therefore, quality contract performance should be ensured by means of bank guarantee requirements for companies awarded the contract.

Recommendation: In order to reduce institutions' subjective approach towards use of bank guarantees for quality performance of contracts, the business sector should be consulted about the possible introduction of legal provision on mandatory guarantees for quality performance of contracts in cases of public procurements with high value.

- **In the second quarter of 2014, total of 10 negative references were issued, whereby 9 companies were put on the so-called black list for the first time. In that, the total number of companies prohibited to participate in tender procedures from the entry in effect of this legal provision until 30 June 2014 reached 54.**

Two from the total of 10 negative references issued in the period April-June 2014 concern one and the same company, whereby the said company is prohibited to participate in tender procedures for a period of 2 years, while the remaining eight negative references concern prohibition for tender participation in duration of one year.

In this monitoring period, the most frequently indicated ground on which companies have been issued negative references is their refusal to sign the contract after their bid has been assessed as the most favourable one. Five companies have been black-listed on this ground. In three cases, negative reference was issued due to activated bank guarantee for quality performance of contracts. In two cases, companies did not provide requested bank guarantees for quality performance of contracts.

Recommendation: Greater transparency is needed in terms of issuing negative references to bidding companies, which means that decisions on negative references must also indicate the contracting authority issuing the negative reference and the relevant number of tender procedure under which this reference was issued. At the same time, it should be examined whether it is justified for all contracting authorities to issue this type of sanctions and whether the prohibition should concern all tender procedures, including an analysis of violations on the basis of which negative references are issued.

ANALYSIS OF PROCEDURES LED IN FRONT OF THE STATE COMMISSION ON PUBLIC PROCUREMENT APPEALS IN THE PERIOD JANUARY-JUNE 2014

- **Multiannual trend of decreasing number of appeals lodged by companies in front of the State Commission on Public Procurement Appeals (SCPPA) is discontinued. Also, for the first time in several years, high share of decisions taken by SCPPA imply approval of appeals.**

In the first semester of 2014, SCPPA was presented with a total of 330 appeals, accounting for an increase by 13.4% compared to the same period last year when a total of 291 appeals were lodged.

Overview of appeals lodged in front of SCPAA

Period	Number of appeals lodged in front of SCPPA	Difference
January-June 2012	338	-32.7%
January-June 2013	291	-13.9%
January-June 2014	**330**	**+13.4%**

Breakdown of decisions taken by SCPPA shows that the highest share of them concerns approval of appeal motions i.e. 39.7%. In that, from total of 131 approved motions of appeal, SCPPA adopted 76 decisions on complete tender annulment and 55 decisions on revoking contracting authorities' decision on selection of the most favourable bid, thereby tasking them to repeat the bid-evaluation process. Hence, dominant are SCPPA decisions that have established irregularities or violations of the Law on Public Procurements made by contracting authorities, which cannot be corrected by any action on their part and necessitate tender annulment.

In the first half of this year, SCPPA rejected 111 appeals motioned by bidding companies as being ungrounded (33.6%) and has therefore taken relevant decisions on rejecting them. 52 motions of appeal (15.8%) were rejected on the grounds of being lodged beyond the law stipulated deadline or because the appealing companies did not settle relevant fees for initiation of appeal procedures. In 19 cases, companies have withdrawn their appeals on own initiative, while in 17 cases contracting authorities requested discontinuation of their tender procedures by approving appeal allegations indicated by companies.

Structure of decisions taken by SCPPA, in the period January–June 2014

Type of decisions	No. of appeals	%
Approving motion of appeal	131	39,7%
Denying motion of appeal	111	33,6%
Rejecting motion of appeal	52	15,8%
Withdrawn appeal (tender procedure is cancelled)	19	5,8%
Appeal approved by contracting authorities (procedure is discontinued)	17	5,1%
Total	**330**	**100%**

Comparison against previous years provides the conclusion that for the first time in the last several years SCPPA has predominantly taken decisions on accepting companies' appeal allegations. In that, the highest shares of SCPPA decisions in the first semesters of 2012 and 2013 concerned rejection of appeal motions, while the highest share of decisions taken in 2014 concern approval of appeals. A positive trend has been observed in terms of decreased decisions on rejected appeals.

However, a detailed analysis shows that in most cases SCPPA has reconsidered only part of appeal allegations, while some of them are not reconsidered at all due to untimely motion of appeal. In other words, this implies that the number of denied appeals might be counted as rejected allegations (although appealing companies have failed to comply with the law-stipulated deadline and SCPPA has not taken them into consideration).

Comparison of types of decisions taken in the appeal procedure

Type of decisions	January-June 2012	January-June 2014	January-June 2014
Approving an appeal	30.8%	29.5%	**39.7%**
Denying an appeal	37.0%	41.2%	**33.6%**
Rejecting an appeal	19.5%	18.6%	**15.8%**
Termination/discontinuation of the appeal procedure	12.7%	10.7%	**10.9%**
Total	**100%**	**100%**	**100%**

In order to obtain a better insight in positions assumed by this second instance body, as well as specific interpretation of particular legal provisions from LPP, this analysis includes summarized findings reached on the basis of comprehensive review of SCPPA decisions taken in the period January-June 2014.

High share of appeals motioned by bidding companies in public procurements imply contesting of contracting authorities' decisions on their exemption from tender procedures, i.e. their bids have been assessed as unacceptable on the grounds that they have failed to fulfil relevant eligibility criteria for tender participation (usually eligibility requirements related to companies' technical and professional ability) or on the grounds that their bids have not fulfilled terms and conditions defined in relevant technical specifications. However, by lodging appeals companies often attempt to demonstrate that the most favourable bid selected in the given tender procedure should have been rejected as unacceptable.

Having in mind that, in some cases, decisions on bids' inadmissibility have been justified with the fact that concerned bidding companies did not submit complete bid-related documents, actual is the problem of different interpretation of Ar-

ticle 140, paragraph 3 of LPP, which reads as follows: "When assessing completeness and validity of documents used to determine bidding companies' eligibility and when evaluating their bids, public procurement committees can request the bidding company in question to clarify or submit additional documents, unless it is not a matter of significant deviations from documents required. Contracting authorities shall not be allowed to create advantages for certain economic operators by requesting additional clarifications or supplements."

In this regard, it is interesting to analyse SCPPA's interpretation of one article from LPP as part of its decision upon an appeal in which the bidding company had been exempted from the bid-evaluation process on the grounds that it did not provide certificate issued by the registry of sanctions for criminal acts committed by legal entities, which has been included under eligibility requirements for companies to demonstrate their ability. In that, the appealing company, referring to Article 140, paragraph 3 of LPP, alleged that the contracting authority has acted in irregular manner when it did not invite the appealing company to supplement its bid-related documents with the certificate issued by the registry of sanctions for criminal acts committed by legal entities. On the other hand, as part of its response to the appeal allegations, the contracting authority has indicated that additional request for this document would have represented violation of Article 140, paragraph 3 from LPP. Ultimately, SCPPA assumed the position that: "The contracting authority has acted lawfully when it did not apply Article 140, paragraph 3 of the Law on Public Procurements." In that, SCPPA remained consistent in its interpretation of this article by assessing that contracting authorities have the right, but are not obliged to request bidding companies to complete their bid documents. Of course, this intensifies the need for further specification of the said article with a view to avoid risks of subjective interpretation thereof.

Having in mind that the monitoring of public procurements has identified cases in which bidding companies have been exempted from further processing (i.e. their bids have been assessed as unacceptable) on the grounds that each individual page of bid-related documents has not been signed (i.e. endorsed) by the responsible or authorized person at the economic operator, it would be useful to analyse SCPPA's position on this matter. Although it is a matter of administrative omission, as part of its decision taken in an appeal procedure, SCPPA assumed a decisive position and established that: "The appealing party (i.e. the bidding com-

pany whose bid has been rejected because it has not been signed on each page) acted contrary to the clear and precise requirements defined in the tender documents, thereby rendering the contracting authority's act on exempting the said bid as unacceptable justified."

Given the fact that organization of e-auctions is mandatory for almost all tender procedures, the issue of unrealistic reduction of prices in course of electronic downward bidding is still a major problem in 2014. In this context, it should be stressed that attempts on the part of some bidding companies to contest bids submitted by their opponents as unrealistically low and suspicious have failed. Namely, cases were observed in which companies request SCPPA to revoke contracting authority's selection decision and to repeat the bid-evaluation process on the grounds that the contracting authority has acted contrary to Article 163, paragraph 1 of the Law on Public Procurements. This means that the appealing company believed that the contracting authority should have requested the bidding company awarded the public procurement to explain in written the unusually low price offered at the e-auction. According to the analysis of SCPAA decisions in these matters, this second instance body has rejected such appeal allegations and has assumed the position that in these cases contracting authorities should not necessarily act in compliance with Article 163 of LPP, but only in cases when they are doubtful that the contract in question would not be performed.

Furthermore, analysis of SCPPA decisions taken in the first semester of 2014 shows that this body has contested contracting authorities' right to request bidding companies to demonstrate their professional and technical ability exclusively by means of previously performed procurement contracts signed with public institutions, i.e. state institutions. In SCPPA's opinion, such eligibility criteria put economic operators that have signed and performed contracts for private companies in unequal position.

As part of several decisions on tender annulments taken in the first semester of 2014 SCPPA reasoned that relevant contracting authorities, which were procuring oil derivatives, have not indicated in their tender documents that biding companies must possess license on performing the relevant energy activity, i.e. license on trading in oil and oil derivatives issued by the Energy Regulatory Commission of the Republic of Macedonia. State Commission did not acknowledge contracting authorities' submission wherein

they claimed that the license in question is only required for wholesale traders, whereas they need a supplier (petrol station) which should not be holder of retail license. SCPPA firmly held its position that in cases of regulated market relevant companies are obliged by law to obtain relevant licenses and therefore contracting authorities failing to request licenses on performance of energy activity are actually in breach of Article 210, paragraph 1, line 3 of LPP.

Participants in public procurements should be aware of SCPPA's position indicated in a decision taken on its session from 29.1.2014 whereby a company that has been issued negative reference and is prohibited from participation in tender procedures, can be enlisted as subcontractor, i.e. an entity providing support for another bidding company with a view to enable the latter to demonstrate technical and professional ability. In this decision, SCPPA quotes BPP's interpretation from 10.6.2013 where it is said that entities being issued negative references cannot participate as bidders in tender procedures, but cannot be prevented in any way to act as support to another bidding company, due to the fact that the black-listed entity is not a direct participant or member of bidding consortium in the tender procedure, but a subcontractor, i.e. supporting entity.

Another SCPPA decision, taken in the first semester of 2014, includes its position on appeal allegations made by a bidding company whereby the bid accepted by the relevant contracting authority had been submitted by another company which is not registered for performance of the activity in question (foodstuff production). When deciding in the appeal procedure, SCPPA has assessed that the selected company had been registered under a general business clause and that, in compliance with the Law on the One-Stop-Shop System and the principle of general business clause, the said entity has been registered to perform all business activities, except those that require specific permits or licences, as regulated under relevant material laws. On this account, SCPPA has concluded that in cases when a particular business activity does not necessitate specific permits or licences, the company is entitled to also perform the business activity in question, irrespective of the fact whether its primary business activity is related to the procurement's subject or not, and therefore the bid submitted by this entity should not have been rejected as unacceptable.

Analysis of SCPPA decisions provides the conclusion that this second instance body assesses as major violation of the Law on Public Procurements (Article 210, paragraph 1, line

3) failure on the part of contracting authorities to request mandatory bank guarantees or statements of serious intent as part of their tender documents. Statements on demonstrating individual bids' independence (pursuant to Article 129, paragraph 2 of LPP) are given the same treatment, because bidding companies that have submitted them confirm, under material and criminal responsibility, that their bid has been submitted in independent capacity, without entering in arrangements with other economic operators that is contrary to the regulations on protection of competition, as well as that they are competing, in the same tender procedure, against other economic operators with which they are related in terms of capital, ownership or family ties.

Under several decisions taken in the monitoring period, SCPPA has expressed its position in relation to contracting authorities' right to annul tender procedures by referring to Article 169, paragraph 1, line 5 of the Law on Public Procurements, which reads: "Contracting authorities shall be entitled to annul the procedure on public procurement contract awarding in cases when: bidding companies have offered prices and terms and conditions for contract performance that are less favourable than actual market prices and conditions." Namely, SCPPA has assessed that contracting authorities cannot refer to this legal provision when the price offered is attained during the e-auction and when it is within the range of procurement's estimated value. This means that contracting authorities have no arguments to prove that prices offered are less favourable than actual market prices.

Analysis of SCPPA decisions taken in the period April-June 2014 confirms gravity of problems related to premature or delayed motions of appeal for tender documents. Namely, appeals contesting the contents of tender documents should be motioned 3 or 8 days following the public opening of bids. In that, bidding companies continue to erroneously motion appeals once they have obtained the tender documents, or after the contracting authority has taken the selection decision, in that contesting the selection of the most favourable bid and presenting evidence on tender documents' inadequacy. In both cases, regardless of appeal allegations' validity, SCPPA does not engage in material analysis of allegations, but simply moves to establish appeal's non-compliance with deadlines stipulated in Article 216, paragraph 2, line 3 of the Law on Public Procurements, which stipulates that appeals related to tender documents should be motioned after the public opening of bids.